IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 353 OF 2005

Albert Cyril Lobo .. PETITIONER

Versus

Raymond Joseph Lobo & Ors. .. RESPONDENTS

Mr. J. M. D'Silva for the petitioner

Mr. K. M. Ranadive for R-1.

CORAM:-SMT. RANJANA DESAI, J.

DATED:-7-2-2005

P.C.

Original defendant 1 in R.A.E. Suit No. 69/143 of 1995 has challenged in this writ petition order dated 1-12-2004 passed by the Small Causes Court at Bombay on Interim Notice No. 2439 of 2004.

2. The plaintiff has filed this suit for eviction of the defendants. Defendant

1 filed his affidavit in examination-in-chief dated dated 4th March, 2004 under Order 18 Rule 47 of the Code of Civil Procedure ("Code" for short), along with the original documents before the Judge, presiding in Court Room No. 14. The advocate for the plaintiff objected for exhibiting certain documents in evidence. The learned Judge exhibited some of the documents and some documents to which objection was taken were merely marked.

3. On 11-6-2004, defendant 1 filed an application Under Section 90 read with Section 32 of the Indin Evidence Act contending that some of the said documents being 40 years old ought to be exhibited and may be exhibited. The said application was numbered as interim Notice No. 2439 of 2004.

4. It appears that in the meantime the learned Judge presiding in Court Room No.14 was transferred to Bandra Court and the said notice came up before her successor presiding in Court Room No. 14. According to the petitioner on 14-7-2004 the learned Judge expressed that since his predecessor has not exhibited these documents, a transfer application should be made before the Chief Judge of the Small Causes Court seeking transfer of Interim Notice No. 2439 of 2004 to Bandra Court. Accordingly defendant 1 made an application before the Chief Judge. The Chief Judge passed his order on the said application on 10-9-2004. He dismissed the

transfer application and directed defendant 1 to get his application for exhibiting documents decided by the learned Judge presiding in Court Room No. 14 without treating it as a review application. In spite of this clear direction given by the Chief Judge, the learned Judge presently presiding in Court Room No. 14 has not considered the defendant's case on merits. In his order he has observed that his predecessor after considering the objection taken by the plaintiffs marked documents at Serial No. 9 to 16 of the list of documents, filed by defendant 1 as articles and once his predecessor has used her discretion not to exhibit the said documents and marked the said documents, as articles, after hearing the objection of the plaintiffs on merits, there was no scope to exhibit those documents as he cannot sit in appeal on the order passed by his predecessor. While so observing the learned Judge overlooked the clear indication given by the Chief Judge in his order dated 10-9-2004, that Interim Notice No. 2439 of 2004 should not be treated as review application and should be dealt with independently. It is, therefore, necessary to remand this matter to the learned Judge with a direction that he should consider the said application of defendant 1 being Interim Notice No. 2439 of 2004 on merits. Hence the following order:

> "That the learned Judge Presiding in Court Room No. 14 of Court of Small Causes,

Mumbai is directed to hear and dispose of the Interim Notice No. 2439 of 2004 in R.A.E. Suit No. 69/143/95 on merits after hearing the plaintiffs and defendants in accordance with law. He should not treat it as Review Application.

I make it clear that this court has not expressed any opinion on merits of the case.

Writ petition is disposed of in the aforestated terms.

.....